Supreme Court of the United States

October Term 1948
No. 371

JOHN KIVO, LEAH KIVO, and MILTON GARFUNKEL, individually and as partners doing business under the firm name and style of JOHN KIVO & Co.,

Petitioners,

against

FRED LOEB,

Respondent.

PETITION OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

Statement of the Case

The presentation of the statement of the case by petitioners is that of an advocate. Objectivity is lacking. Therefore, we pray that the Court accept the findings of fact of the trial court (866-882), as well as the statement of facts set forth in the opinion of the Court of Appeals (pp. 309-312), as the basis for its consideration of the merits of this petition.

II.

ARGUMENT

POINT A

The Act clearly gives the District Court the power to render a money judgment in favor of the veteran.

This Court, in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, held that the Act was to be liberally construed for the benefit of the veteran. It was there held that the Act contained a "guarantee against discharge" and at page 286, this Court said:

> "The guarantee against discharge 'from such position' is broad enough to cover demotions. The veteran is entitled to be restored to his old position or to a 'position of like seniority, status, and pay.' If within the statutory period, he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of Sec. 8 (c) be 'discharged from such position.' "

In this case petitioners failed to grant respondent his rightful position. They gave him a different one. This was tantamount to a discharge, "without cause".

When an employer by his acts and conduct clearly indicates his purpose not to abide by an agreement of employment, the contract is repudiated and the employee deemed discharged. (*Taylor* v. *Tulsa Tribune Co.*, 136 F. (2d) 981, 982; *Helfer* v. *Corona Products, Inc.*, 127 F. (2d) 612, 622.)

It follows that the employee may seek damages for his wrongful discharge.

The Act follows the pattern of the common law. Congress provided that the veteran "shall not be discharged from such position without cause within one year after such restoration" (8c). The "guarantee" of which this Court spoke in the *Fishgold* case, thus, in effect, became a contract of employment for one year.

Congress then made provision for violation of the Act (breach of contract) by the employer. It provided that for the failure or refusal to comply with the Act, the District Court should have the power "to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action" (8e).

True, the words of the Act which precede "to compensate" are "as an incident thereto" as pointed out by petitioners (8e). On the construction of these words, the present petition is based.

The gist of petitioners' argument is found at page 15 of their brief. "As an incident thereto" is claimed by them to mean that reinstatement plus lost wages was due the returning veteran, but not reinstatement or wages. In developing this argument, petitioners conclude that by following the letter of the law, if only wages may compensate the veteran, the Court is without power to grant such relief to the veteran.

That such an interpretation is a far cry from the intention of the Act, we submit, is obvious. As we search the

brief of petitioners, the key to their erroneous argument is to be found in this sentence at page 15 of their brief:

> "At the end of this idle time the veteran is fully protected by the provision that he is entitled to keep his job one year from the date of reinstatement."

What Congress intended was a guarantee of employment for one year from the date that the veteran was to be restored to his position immediately after his return from the armed forces and his application for restoration. If after his restoration, he was discharged without cause, or if denied restoration, the veteran could seek reinstatement and compensation for the loss of time—and if a full year elapsed before reinstatement would be made, as in the instant case, he could seek compensation alone.

If we understand petitioners' argument, they say that the veteran is entitled to be compensated for his idle time and in addition is to be "reinstated" for one year. Such a construction leads to absurdities. What if one veteran is idle one day and another three hundred and sixty-four days of the year? After they are compensated for idle time, are they both to work a year thereafter at "escalator" wages? Assuming that the differences between the employer and employee become so acrimonious as to make it unfeasible to direct reinstatement, must the Court, nevertheless, decree reinstatement? These questions and many others present themselves. The construction suggested by petitioners would not effect the purpose of the Act.

This Court has held that where strict adherence to the letter of a statute would result in an absurdity, such construction will be rejected. (*U. S.* v. *Katz*, 271 U. S. 354.)

How specious and baseless the argument of petitioners is, is best illustrated by the sources cited by them.

When the District Courts were given the power to compensate the veteran, Congress unequivocally stated its reasons for doing so. Senator Wagner stated:

> "The amendment simply provides that in addition to entering judgment finding that the employer has violated the law and that the individual is entitled to re-employment, the court may also order that he shall receive back pay for lost wages due to the violation of the law."

Thereafter, upon being questioned by Senator Danaher, Senator Wagner replied, as follows:

> "Mr. Wagner: * * * The amendment simply provides that in addition to the power now granted the court to restore the individual to his position if there has been a violation of law by the employer, the individual shall also have the wages lost during the period of the proceeding in court.
>
> "Mr. Danaher: While the issue is being determined?
>
> "Mr. Wagner: Exactly."

In the House, Congressman Healey said:

> "Mr. Chairman, this amendment merely gives the courts, after a decision has been reached in favor of the applicant for relief from failure to reinstate, power to assess as damages the loss of wages suffered by such applicant from the time he applies for reinstatement up to the time that the court finds that such reinstatement is justified on the facts and circumstances of the case. You have held out to

> these men you are going to induct into service that you will restore them insofar as you have the power to restore them to their status quo before they were inducted into the service. It seems to me it is a matter of simple justice that if on all the facts the court finds that it is not unreasonable or impossible to reinstate that man, and the private employer has refused and thereby violated the provisions of this section by such refusal, the court ought to have the power to reinstate the man and assess as damages the loss of wages he has suffered from the time he applied for reinstatement until the court renders a decision in his favor."

Congressman Celler, then stated:

> "I believe the gentleman's amendment is well founded and logical, because, as the act is now worded, on page 29, line 15, the court has no standard by which it may judge the issue; in other words, all the court can do is come to an adjustment of the claim in its exclusive discretion with no standard. There is no standard in the bill. The gentlemen's amendment is definite and clear and seems fair and equitable. It should be adopted."

Standards were set and fixed, and the trial court here made proper disposition of the case within those standards.

If any confusion exists as to this Act, as claimed by petitioners, it is solely the result of their reasoning.

The letter from the Committee on Armed Services of the United States Senate set forth on page 27 of the brief of petitioner does not substantiate the charge of petitioner that confusion reigns as to the Act. There we find:

> "There is no particular legislative history on the subject, since the changes were non-controversial and did not seem to represent a departure from the existing situation."

Let us assume, *arguendo,* that "as an incident thereto" means what petitioners say it means. That these words also have the significance of matters collateral and accessory, directly pertinent to, or in some relation to, is equally true. (*In re Elimination of Highway—Railroad Crossing,* 271 App. Div. 266.)

Where the words of a statute have various known significations, the proper course for the courts is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promises in the fullest manner the apparent policy and objects of the legislature. (*Johnson* v. *Southern P. Co.,* 196 U. S. 1.)

Only by giving the words "as an incident thereto" the meaning which the District Court and the Court of Appeals gave them, can the policies and objects of the Act be given the significance which this Court pronounced in the *Fishgold* case.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a Writ of Certiorari should be denied.

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